UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 28

KHAVKIN CLINIC, PLLC,

Respondent.

Cases.: 28-CA-220023

28-CA-223014

and

MICHAEL SCHNEIER, an Individual

RESPONDENT'S POST-HEARING BRIEF

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RESPONDENT'S POST-HEARING BRIEF

Respondent, Khavkin Clinic, PLLC (hereinafter the "Clinic" or "Respondent") hereby files this Post-Hearing Brief.

I. INTRODUCTION

Dr. Michael Schneier was terminated because he was unprofessional in a profession that demands the highest standards. His friend, Dr. Yevgeniy Khavkin, gave him chance after chance, including loaning him a large sum of money and trying to help Dr. Schneier develop a book of business. But at a small health facility like the Khavkin Clinic, where the business model depends on referrals and strong connections at local hospitals, Dr. Schneier's badmouthing of fellow doctors, co-workers, and the general animosity he showed towards the medical community—including his rampant use of the "N Word"—finally crossed a line. Dr. Khavkin summarized it aptly on Day 1 of the Hearing:

[Dr. Schneier] was making multiple derogatory comments about other physicians using both racist terms and chauvinistic terms. Multiple doctors, several doctors had called me and told me that they've never heard as unprofessional interaction . . . he was making those comments about myself and Dr. Takagi to other people in surgeries.

See Hr'g Tr. Day 1 Aug. 13, 2019, at pg. 125-26.

Underlying the Khavkin Clinic's obvious need to terminate Dr. Schneier was the fact that he was unprofitable and underperforming. Dr. Schneier billed for less than half the amount of surgeries as other doctors in the Clinic. This poor performance made Dr. Schneier unprofitable. Nonetheless, as Dr. Khavkin put it, the final straw that precipitated Dr. Khavkin's termination decision was when Dr. Schneier began "telling my staff to lie to me." *See* Hr'g

Tr. Day 1 Aug. 13, 2019, at pg.179. Dr. Khavkin had determined that he had no choice but to terminate Dr. Schneier.

Dr. Schneier's charges before this Tribunal are vengeful and asserted in bad faith. In pursuing the charges, the General Counsel for the NLRB has unwittingly let the Board's office be used as an avatar for the animus of a disgruntled doctor. Once terminated, Dr. Schneier did not respond to the termination letter. He did not hire a lawyer and allege he was wrongfully discharged. That is—not until—Dr. Khavkin rightfully sought to collect Dr. Schneier's unpaid loan in a civil suit. Only then did Dr. Schneier allege any violation of the NLRA. The NLRA was never meant to be used as a sword for the personal vendetta of an arrogant and highly compensated doctor. The broad intention of the Act is to provide a shield that guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection." 29 U.S.C. §§ 151-169. The record shows no evidence that any of these rights have been violated by the doctor's employer.

This Tribunal should dismiss the Consolidated Complaint and rule in favor of Dr. Khavkin for any of the following reasons: First, the NLRB does not have jurisdiction. The Clinic is a private medical practice located and operating predominantly in Las Vegas, Nevada, with a very small patient service provided in Arizona. The Clinic is not engaged in business such that it substantially affects commerce and is extremely local in nature. Further, it is not a health care clinic. The Clinic is functionally a hub for doctors who contract with local hospitals for surgery, and see patients in coordination with those hospitals.

Second, a majority of the evidence—which already failed to establish the underlying charges—referenced activities precluded by Rule 10(b). Under that rule, only actions within the previous 6 months can be considered. The actions giving rise to Dr. Schneier's claims did not occur in the 6 months before his filing.

Third, if this Tribunal decides not to dismiss the charges on jurisdictional grounds, Dr. Schneier never came close to engaging in concerted action. Concerted activities are "activities of employees who have joined together in order to achieve common goals." *NLRB v. City Disposal*, 465 U.S. 822, 831 (1984)). Dr. Schneier was no warrior for the employees as the Consolidated Complaint alleges. His actions did not intend group activity or represent another employee. *See Aro, Inc. v. NLRB*, 596 F.2d 713, 717 (6th Cir. 1979). The General Counsel for the NLRB failed to satisfy its burden of proof. General Counsel did not establish that Dr. Schneier came forward with concerns of other employees, or that any employees authorized him to come forward on their behalf, and the only employee it brought forward, denied that Dr. Schneier ever tried to advocate for her—I "never said, oh, can you please go and do this for me." *See* Hr'g Tr. Day 2, Aug. 14, 2019, at pg.434.

Fourth, and as was discussed above, assuming *arguendo* Dr. Schneier was engaged in concerted activity, there was no evidence or testimony presented to establish a nexus between any alleged concerted activity and Dr. Khavkin's decision to terminate him. Dr. Khavkin outlined a well-articulated rationale that was supported by a number of other witnesses for Dr. Schneier's discharge. This was not pre-text; it was a well-founded termination based on Dr. Schneier's incompetence and insubordination.

And finally, Khavkin Clinic's neutral confidentiality clause did not infringe on Dr. Schneier's rights. Dr. Schneier's employment contract, not the employee handbook, governed

his employment and it was rationally related to the objectives of a medical provider. Despite Dr. Schneier's allegations, the evidence presented at the Hearing shows that Schneier was not engaged in concerted activities, he was terminated for reasons that are not protected, and the Clinic's rules were not unlawfully overboard.

In accordance with the foregoing, Respondent, hereby, requests that this Tribunal rule in favor of the Khavkin Clinic and dismiss the charges in the Consolidated Complaint.

II. STATEMENT OF THE CASE

Dr. Schneier filed two separate charges with the NLRB. On May 10, 2018, Schneier filed charges with the NLRB alleging Khavkin terminated Schneier's employment in retaliation for Schneier "complaining to Khavkin regarding wages, hours and working conditions" under NLRB Case No. 28-CA-220023. *See G.C. Exhibit 1(a)* (Original Charge against Khavkin 28-CA-220023 dated May 10, 2018). On June 29, 2018, Schneier filed additional charges with the NLRB alleging that the Clinic threatens its employees with, and implements, overly broad and/or discriminatory rules and/or directives that prohibit employees from engaging in concerted activities, and further alleging that the Clinic discriminated against Schneier by discharging him and filing a lawsuit against him in retaliation for/and in order to discourage protected activities under NLRB Case No. 28-CA-223014. *See G.C. Exhibit 1(c)* (Original Charge against Khavkin 28-CA-223014 dated June 29, 2018).

A. Schneier's Charges Under Case No. 28-CA-220023

Dr. Schneier's first Charge alleged that the Khavkin Clinic violated Section 8(a)(1) of the National Labor Relations Act (the Act), alleging the following:

a. About November 2017, Dr. Schneier complained to Khavkin Clinic regarding the wages, hours, and working conditions of

Khavkin's employee(s), by voicing concerns about employee pay, patient safety, and coercion in the work place.

- b. About November 25, 2017, Khavkin Clinic discharged Dr. Schneier.
- c. Khavkin Clinic engaged in the conduct described above in paragraph (b), because Dr. Schneier engaged in the conduct described above in paragraph (a) and to discourage employee(s) from engaging in these or other concerted activities.

On May 10, 2018, Joel E. Ruiz-Lopez with the NLRB sent a letter to the Khavkin Clinic informing the Clinic of the above charges. On June 12, 2018 the NLRB sent a letter requesting evidence. On June 26, 2018 Khavkin Clinic provided a Statement of Position with relevant supporting documentation. And on July 10, 2018 the NLRB requested supplemental information specifically related to the statements made by Dr. Schneier and to whom he made his statements to, as well as requesting surgeries billed.

On July 30, 2018, Khavkin Clinic provided a supplemental Confidential Statement of Position.

B. Schneier's Charges Under Case No.: 28-CA-223014

Dr. Schneier's second Charge alleged that Khavkin Clinic violated Section 8(a)(1) and (7) of the National Labor Relations Act (the "Act") by:

- A. Threatening employees and promulgating overly broad and/or discriminatory rules and/or directives that prohibit employees from engaging in concerted activities.
- B. Discrimination against employee Dr. Michael Schneier by, among other acts, discharging him and filing a lawsuit against him in retaliation for and/or in order to discourage protected concerted activities.

On June 29, 2018, Joel E. Ruiz-Lopez with the NLRB sent a letter to the Clinic informing the Employer of the above charges. On July 31, 2018, the NLRB sent a letter

requesting evidence. On August 8, 2018, Respondent provided a Statement of Position with relevant supporting documentation on behalf of the Clinic.

The Regional Director issued an Order Consolidating Case, Consolidated Complaint and Notice of Hearing, on September 28, 2018. *See* G.C. Exhibit 1(e) (Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing dated September 28, 2018).

The case was tried August 13 to 15, 2019, in Las Vegas, Nevada (hereinafter referred to as the "Hearing").

C. This Tribunal's Delayed Ruling on the NLRB's Jurisdiction in the Matter

Preceding opening statements in the Hearing, Khavkin re-raised his Motion to Dismiss for this Tribunal's lack of jurisdiction, arguing that the Clinic is not a health care institution as defined by the Act and that it is not engaged in interstate commerce. *See* Hr'g Tr. Day 1 Aug. 13, 2019, at pg. 34. Applying the jurisdiction test from *East Oakland Community Health, et al.*, 218 NLRB 1270, Khavkin argued that the Clinic is local in character and its impact on interstate commerce is minimal. *See* Hr'g Tr. Day 1 Aug. 13, 2019, at pg. 35. Addressing how much revenue was generated, Khavkin argued that even though a nominal amount is generated from Arizona, \$12,000, is insufficient to establish jurisdiction or change the Clinic's local character. *See* Hr'g Tr. Day 1 Aug. 13, 2019, at pg. 36.

In response, General Counsel argued and relied on the proposition that it would establish the Clinic is a healthcare institution and, therefore, covered under the NLRA and would provide evidence that the Clinic is not local in nature. *See* Hr'g Tr. Day 1 Aug. 13, 2019, at pg. 37. General Counsel also relied on *Carolina Supplies & Cement Co.*, 122 NLRB 88, which applied jurisdiction to retail enterprises with gross business volumes of at least \$500,000 annually. *Id*.

This Administrative Law Court delayed its ruling, "let[ting] [General Counsel] put [his] evidence on about it being a health care clinic." *Id.*, at pg. 38. The Administrative Law Judge did, however, acknowledge that its research had not found a case where less than \$50,000 in retail purchases conferred retail enterprise jurisdiction for the NLRB. *Id.*, at pg. 38-39. General Counsel promised to present evidence of more than \$5,000 in purchases of goods, but was unable to guarantee he could present evidence of greater than \$5,000. *Id.*, at pg. 39-40. This Tribunal delayed ruling on this issue saying that it would "put them to . . . the test," waiting for the evidence to be introduced. *Id.*, at pg. 41.

III. STATEMENT OF FACTS

Michael Schneier, M.D. ("Schneier") is a former employee of the Clinic. *See* Hr'g Tr. Day 1 Aug. 13, 2019, at pg. 43 ¶ 18-20. Schneier is a highly educated surgeon and was a highly paid employee of the Clinic from July, 2016 to November 21, 2017. *See* Hr'g Tr. Day 1 Aug. 13, 2019, at pg. 132 ¶ 17-19; *see also* Hr'g Tr. Day 2, Aug. 14, 2019, at pg.293 ¶ 12-13; *see also* Hr'g Tr. Day 2, Aug. 14, 2019, at pg. 324 ¶ 3-4; *see also* Respondent's Exhibit 1 (Physician Employment Contract between Khavkin Clinic and Schneier); *see also* G.C. Exhibit 8 (Termination Letter to Schneier dated November 21, 2017).

During the course of Dr. Schneier's employment, the Clinic received reports that Schneier had made false and derogatory comments about the Clinic, other surgeons employed by the Clinic, and even about surgeons the Clinic would collaborate with from time to time who were not employed by the Clinic to his fellow employees at the Clinic, to colleagues in the medical community, and even to patients of the Clinic and the local hospital. *See* Hr'g Tr. Day 1 Aug. 13, 2019, at pg. 156; 168-174.

Additionally, the Clinic was concerned about Schneier's failure to meet some of the basic requirements of his employment. *See* Hr'g Tr. Day 1 Aug. 13, 2019, at pg. 249-250. One vital specific concern was the fact that Dr. Schneier failed to report billing for several weeks. *Id.*. When Dr. Khavkin attempted to address the Clinic's concerns to Dr. Schneier regarding Dr. Schneier's behavior, Dr. Schneier did not return Dr. Khavkin's phone calls or text messages. *Id.*

Therefore, in accordance with the foregoing, on November 21, 2017, the Clinic decided to terminate Dr. Schneier. *See* G.C. Exhibit 8 (Termination Letter to Schneier dated November 21, 2017). The termination letter explained that Dr. Schneier was discharged from his employment because: "(1) [he] failed to meet the most basic requirements of [his] employment" – not performing/billing surgeries; (2) making "derogatory and accusatory comments concerning other surgeons with the Clinic" to third parties and patients; and (3) Dr. Schneier failed to communicate with any manager of Khavkin Clinic. *See* Hr'g Tr. Day 1 Aug. 13, 2019, at pg. 249-250.

While Schneier was employed by the Clinic, he had negotiated an agreement with the Clinic whereby the Clinic would loan Schneier funds on several different dates in exchange for a promise that the funds would be repaid with five percent (5%) interest per annum. *See* **Respondent Exhibit 3 (Promissory Note)**; *see also* **G.C. Exhibit 14 (Affidavit of Dr. Khavkin)**. After he was terminated, Dr. Schneier failed to repay the loans he received from the Clinic. *Id.* Therefore, Khavkin initiated a civil suit in the Clark County District Court under Case No. A-17-766009-C to recover both the principle and interest remaining on the loans on December 8, 2017. Subsequent to the initiation of the Khavkin's civil lawsuit against Schneier,

Schneier filed two separate charges with the National Labor Relations Board: Case No.: 28-CA-220023 and Case No.: 28-CA-223014.

IV. <u>LEGAL ARGUMENT</u>

A. The NLRB Lacks Jurisdiction Over Khavkin Clinic.

The NLRB does not have jurisdiction over the Clinic and this matter should be dismissed. The NLRB has jurisdiction over employers whose activities affect interstate commerce. 29 U.S.C. § 152. In the context of health care institutions, the NLRB—in-line with congressional intent—has limited its jurisdiction to health care institutions who's activity substantially impacts interstate commerce. *E. Oakland Cmty. Health All., Inc.*, 218 NLRB 1270 (N.L.R.B. 1975). As part of this assessment, the Board applies a two-part test: (1) whether practice is local in character, and (2) if its impact on interstate commerce is substantial. *Cleveland Ave. Med. Ctr.*, 209 NLRB 537 (N.L.R.B. 1974). The NLRB may also decline jurisdiction where asserting jurisdiction would not further its purposes. *N.L.R.B. v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675 (1951).

1. Khavkin Clinic is Local in Nature and is Not Engaged in Business "Substantially Impacting Commerce" Between States, as Required Under the NLRA to Confer this Board's Jurisdiction.

Khavkin's private medical practice does not substantially impact interstate commerce because it is local in character and its impact on interstate commerce is insubstantial. The Board has already recognized that a private medical practice does not substantially impact interstate commerce. The matter of *Cleveland Ave. Med. Ctr.* involved a medical practice consisting of ten doctors who performed medical services at their Columbus location. *Id.* Approximately 99 percent of the treated patient's local residents. *Id.* Moreover, this practice did not provide any overnight care for patients and instead, when need arose, patients were

referred to a hospital. *Id*. The Board held this insufficient to confer jurisdiction because the employer's medical practice was local in character and its effect on commerce was not substantial enough to warrant jurisdiction even though the employer's salary was near \$1,000,000 per year and the employer routinely purchased insurance premiums and medical supplies interstate. *Id*.

Even though *Cleveland* has since been overruled by superseding statute, the test it outlined for determining whether a health care institution affects interstate commerce is still good law. *See Bio-Med. Applications of San Diego, Inc.*, 216 NLRB 631 (N.L.R.B. 1975) ("In our opinion an examination of this legislation and its legislative history shows that the purpose of the 1974 health care amendment was to extend the jurisdiction of the Board to all health care institutions, as defined in Section 2(14) of the Act, which have a substantial impact on commerce..."). In *Bio-Med. Applications*, the Board found jurisdiction when an employer was "doing business in San Diego, California, was a corporation organized under the laws of the State of Delaware," was treating a number of people whom were not local, and a number of other relevant facts. *Id.* The Board relied on the following:

- Employer's annual gross revenue was approximately \$587,748:
 - o \$215,000 was in the form of Med-cal payments;
 - o \$233,000 was in the form of Medicare reimbursements; and
 - The remaining annual gross revenue was derived directly from the patients themselves, from hospitals in which the Employer provided hemodialysis treatments, or from private insurance companies.
- Employer treated 45 patients:
 - o 30 resided in either San Diego County or nearby Imperial County, and were treated on a regular basis; and
 - o 15 patients were visitors or transients normally treated elsewhere, the majority of which resided outside of California.
- Employer purchased supplies, including drugs and medication, from companies located outside the State of California amounting to approximately \$100,000.

- the Employer purchased approximately \$18,000 in capital equipment used for patient care from distributors located outside the State of California.
- Employer entered into service contracts worth approximately \$440 with equipment companies whose headquarters are outside California.

See Id.

Bio-Medical's operations were not limited to California and substantially affecting commerce. Of note, approximately 33% of patients who visited the medical facility were located outside the state and the facility received 40% of its revenue from interstate federal funding. The Board also expressly did not adopt a dollar amount requirement for jurisdictional standards. *See Id.* ("[W]e do not, however, decide at this time specifically what dollar volume standard will be applicable to facilities such as this.").

When a small healthcare institution does not receive substantial federal funds, the Board does not have jurisdiction. In *E. Oakland Cmty. Health All., Inc.*, the Board asserted jurisdiction because the record established that the greatest portion of the Employer's revenues derived from Federal revenue sharing, nationally administered by the Social Security Administration. *Id.* at 1270-71. The Board held that the employer's receipt of money through federally supported health care programs adequately demonstrated that the employer's operations had a substantial effect on commerce. *Id.* at 1271. The Board also decided to impose a higher discretionary jurisdiction limit in cases involving all other types of health care institutions as defined in Section 2(14) of the Act to employers who receive at least \$250,000 in gross revenues per annum. *Id.*

Here, the Khavkin Clinic is local in nature and does not substantially affect interstate commerce. The Clinic is located solely in Las Vegas, Nevada, which sees 20 patients a month in Arizona, with "nothing beyond consultations and seeing patients," compared to the thousands of patients seen in Las Vegas. *See* Hr'g Tr. Day 1, Aug. 13, 2019 at pg. 65. There are no procedures at the Clinic, the procedures are performed at various hospitals around the

City of Las Vegas. See Hr'g Tr. Day 1, Aug. 13, 2019 at pg.153-54. It is a private clinic – privately funded and privately operated. Unlike E. Oakland, its revenues are not derived from federal revenue sharing. Instead, the Clinic operates in a very specific area in the local medical industry providing comprehensive spine, neurosurgery and pain management specialists, who operate out of the only office. The Clinic is local in every sense of the word and it would be an absolute abuse of discretion to classify it in the same category as: a manufacturing company in California that sells and ships its product to buyers in Oregon; or a company in Georgia that buys supplies in Louisiana; or a trucking company that transports goods from one point in New York State through Pennsylvania to another point in New York State; or a radio station in Minnesota that has listeners in Wisconsin. On direct examination by General Counsel, Dr. Khavkin testified that as a convenience to a very small group of patients, he goes to a rented office in Arizona once a month. This is truly not in an effort to bolster revenue, but as a customer service for his patients. Dr. Khavkin testified that his collected revenues from this outing is approximately \$12,000 a month, (See Hr'g Tr. Day 1, Aug. 13, 2019 at pg. 36), far less than the \$250,000 in revenue required by the Board for jurisdiction in E. Oakland Cmty. Health.

Simply, jurisdiction was not established at the Hearing. The Clinic equipment and operating expenses did not substantially affect interstate commerce. The practice is local in nature. General Counsel failed to rely on any document showing amounts spent out-of-state, and no witness was able to provide an amount that was spent on these expenses. Even aside from the showing at the Hearing, any further discussion is mooted by the fact that the Consolidated Complaint never provided allegations pleading jurisdiction. In fact, the Consolidated Complaint's only allegation regarding interstate commerce is that the Clinic

"purchased or received... goods valued in excess of \$5,000, directly from points outside the State of Nevada." General Counsel continued this argument in his opening statement arguing that the Board would assert jurisdiction over all retail enterprises that generate over \$5,000.

General Counsel's use of Carolina Supplies—applying a monetary amount to retail sales—is off base because the Clinic is not a retailer. Carolina Supplies & Cement Co., 122 NLRB 88, 89 (1958). There, the Board decided that it would assert jurisdiction over all retail enterprises which fall within its statutory jurisdiction and which do a gross volume of business of at least \$500,000 per annum. Carolina Supplies & Cement Co., 122 NLRB 88, 89 (1958). (emphasis added). The Board held it would apply this standard to the total operations of an enterprise whether it consists of one or more establishments or locations, and whether it operates in one or more states. *Id.* As stated above, General Counsel's reliance on this holding is completely off-base. First, Carolina Supplies was addressing the sale of building supplies. Id. Second, there the Board only articulated that "retail enterprises" could also consist of taxicabs companies. *Id.* Third, General Counsel has not provided an explanation for how this 1958 standard applies to a private medical practice subject to the 1975 amendments to the NLRA as codified in Section 2(14). Fourth, E. Oakland Cmty. Health All., Inc., 218 NLRB 1270 (N.L.R.B. 1975) establishes a separate discretionary standard for healthcare institutions. Fifth, General Counsel did not establish through any documents or witness testimony any specific amounts generated by the Clinic's business operations.

When compared to the discretional standards applied by the Board, \$5,000 is a mere two percent. There is nothing substantial about two percent and there is certainly nothing substantial in the Consolidated Complaint's allegations enough to warrant the assertion of jurisdiction. Consequently, because the Clinic is undisputedly local in character, does not

substantially impact commerce, and the Consolidated Complaint fails to plausibly allege the necessary facts, the Board does not have jurisdiction and the Consolidated Complaint should summarily be dismissed.

B. Under the NLRA Section 10(b), The Statute of Limitations Has Run, General Counsel's Scope is Limited, and the Case Should be Dismissed.

Even if the Administrative Law Judge decides that the NLRB may assert jurisdiction in this case, Section 10(b) of the NLRA extinguishes liability for unfair labor as a statute of limitation for allegations committed more than 6 months prior to the filing of a charge. *See* Section 10(b) (providing that no complaint may issue on matters occurring over 6 months prior to the filing of a charge and the service of a copy of the charge on the charged party). The time period under Section 10(b) is computed from the date of clear and unequivocal notice of the alleged unlawful act, rather than the date its consequences become effective. *See Postal Service Marina Center*, 271 NLRB 397 (1984). Evidence may be considered that is outside of the 10(b) period if the evidence is used only as background and not to prove a time-barred unfair labor practice. However, when the conduct within the 10(b) period can be found to be an unfair labor practice only through the reliance upon an earlier unfair labor practice, evidence of earlier conduct cannot be used.

Here, Dr. Schneier has filed two charges in this matter, the first on May 10, 2018 and the second on June 29, 2018. Dr. Schneier's May 10, 2018 Charge alleges that (1) the Clinic essentially prohibited Dr. Schneier from engaging in concerted activities; and, (2) the Clinic filed a civil lawsuit in retaliation for engaging in concerted activities. Because the NLRA time-bars all matters beyond the 6 months preceding May 10, 2018, including the actual day of the unlawful act, his complaint should be dismissed in its entirety because it is before the

6-month period. Further, any allegations prior to November 10, 2017 are outside the scope of this matter and should not be considered.

Dr. Schneier's allegations are time-barred on the face of the complaint. In Consolidated Complaint paragraph 4(a), it states that "From about *July 2017 through about October 2017*... Schneier engaged in concerted activities with other employees..." The Consolidated Complaint makes no other reference to the concerted activities of Schneier and the Clinic. So, under NLRA 10(b), the allegations under 4(a) are time-barred, and should not be considered.

The second charge, filed on June 29, 2018, is *even further* removed from the alleged actions of the Clinic. Under the clear and unambiguous language of the NLRA, 6 months prior to this charge would be December 29, 2017. As stated in the Consolidated Complaint, Dr. Schneier's employment with the Clinic ended on November 25, 2017. Because he wasn't an employee, it is impossible that Dr. Schneier could allege an unlawful act was committed during this 6 month time period. Therefore, because Dr. Schneier cannot bring relevant claims during the conditional time-frame, he cannot be considered to be qualified as a charging party.

See NLRB Rules and Regulations §102.9; NLRB Case handling Manual § 10018.2. Any charges pursuant to the June 29, 2018 must be dismissed as time-barred.

Conversely, it may be argued that an unfair labor practice could include an employee's discharge itself, if the background information falls outside of the time period, it is inequitable to allow an open-ended period of time for a disgruntled employee to file a claim. Based on the record, it is cleared that Dr. Schneier was aware of the issues he believed affected his employment – he filed a charge on May 10, 2018. However, Dr. Schneier's decision to wait to bring an additional claim outside the employment period fails to show its relevance to him

and is instead an open-ended complaint (of which zero evidence was discussed during the 3-day Hearing).

Instead, a clear application of NLRA 10(b) sets forth a straightforward removal of liability for unfair labor practices committed more than 6 months prior to the filing of a charge. The June 29, 2018 Charge is late, and those allegations should not be considered. Based on the allegations of the Consolidated Complaint, the May 10, 2018 Charge fails to cover any alleged protected concerted activity and at most only covers Dr. Schneier's discharge. Therefore, based on those limitations General Counsel failed to meet his burden and the Complaint should be dismissed.

C. General Counsel Has Failed to Meet His Burden of Proof to Establish That Khavkin Clinic Violated the NLRA.

The General Counsel failed to present evidence to support any of the allegations in his Consolidated Complaint that Respondent engaged in an unfair labor practice under the NLRA. The Consolidated Complaint ¶ 5 specifically asserts that Respondent's discharge of Dr. Schneier violated Section 8(a)(1) of the NLRA because he was engaging in protected "concerted activity." However, after having several days to present evidence and testimony to the Administrative Law Judge, the General Counsel failed to establish: (1) Dr. Schneier was engaged in protected concerted activity; and (2) his discharge was motivated by his engagement in protected concerted activity.

1. General Counsel Has Failed to Establish That Dr. Schneier Was Engaged in Protected "Concerted Activities."

Section 8(a)(1) of National Labor Relations Act states that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 157. 29 U.S.C. § 158. Such rights include: "the right to self-

organization, to form, join, or assist labor organizations, to bargain collectively through representatives,... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection... 29 U.S.C. § 157. Although the term "concerted activity" is not defined in the Act, "it clearly enough embraces the activities of employees who have joined together in order to achieve common goals." *NLRB v. City Disposal*, 465 U.S. 822, 831, 104 S.Ct. 1505 (citing *Meyers Indus.*, 268 N.L.R.B. No. 73, at 3 (1984)). The NLRB has held out to the public that:

Concerted activities" is when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment. A single employee may also engage in protected concerted activity if he or she is acting on the authority of other employees, bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action.

See National Labor Relations Board Website, "Employee Rights," https://www.nlrb.gov/rights-we-protect/rights/employee-rights.

The Board's test for "concerted activity" is whether activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Buel, Inc.,* 39 NLRB AMR 21; *citing Meyers Industries,* 281 NLRB 882, 885 (1986) (Meyers II), *aff' d sub nom. Prill v. NLRB,* 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied,* 487 U.S. 1205 (1988). While concerted activities are generally when a group of employees act collectively, individual activities that are the "logical outgrowth of concerns expressed by the employees *collectively*" may be considered concerted. *Id.*; *see e.g., Five Star Transportation, Inc.,* 349 NLRB 42, 43-44, 59 (2007), *enforced,* 522 F.3d 46 (1st Cir. 2008) (multiple drivers' letters to school committee raising individual concerns over a change in bus contractors were logical outgrowth of concerns expressed at a group meeting). (emphasis added). Generally, it requires that the activities be aimed at joining and assisting union-type activities. *Mobil*

Exporation and Producing U.S., Inc. v. N.L.R.B., 200 F.3d 230, 238 (5th Cir. 1999) (citing City Disposal).

Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where individual employees bring "truly *group* complaints" to management's attention; individual action cannot be solely by and on behalf of the employee himself. *Id.; Meyers Indus.*, 281 NLRB 882, 885 (1986). (emphasis added). And while an individual employee can engage in concerted activity alone, the employee's activity is only covered by Section 7 when his or her individual actions intend to induce group activity and his actions represent at least one other employee. *See Aro, Inc. v. NLRB*, 596 F.2d 713, 717 (6th Cir. 1979); *see also NLRB v. Northern Metal Co.*, 440 F.2d 881, 884 (3rd Cir. 1971). Concerted activity does not include circumstances in which individual employees seek to initiate or to induce or to prepare for group action that does not go beyond mere griping, because such employees never band together to seek an improvement in the terms and conditions of their employment. *Meyers Indus.*, 281 NLRB 882.

The Meyers II Decision and Order addressed the application of law to the facts of the underlying dispute between Meyers Industries, Inc. and Kenneth P. Prill ("Prill") (*Meyers Indus.*, 268 NLRB 493 (1984)). In Meyers I, the employee, Prill was employed as a truck driver and would haul boats from the employer's facility to dealers throughout the country. Prill's equipment, particularly the brakes and steering, gave him difficulty on a number of occasions, and he often lodged complaints with the Respondent concerning malfunctions. *Meyers Indus.*, 268 NLRB 493, 497–98 (1984) (Meyers I). Other employees also experienced steering problems. *Id.* Prill overheard an employee inform a manager that the employee was concerned about the state of the truck stating that that he "wouldn't take the truck... until they

had done some repair on it. Until someone repaired it." *Id.* Prill also called multiple times to voice his concerns but was lectured for not continuing on his routes. *Id.* Thereafter, Prill, of his own volition, contacted the Tennessee Public Service Commission to arrange for an official inspection of the vehicle. *Id.* The following morning a citation was issued, and the unit was put out of service due to bad trailer brakes and damage to the hitch area of the truck. *Id.* The citation mentioned several Department of Transportation regulations, including 49 C.F.R. § 396.4, which prohibits the unsafe operation of a vehicle. *Id.* A commission representative instructed Prill that certain repairs would have to be made before the vehicle could be moved. *Id.* The employer's representative decided to sell the trailer for scrap and Prill drove back with the truck. *Id.* Ultimately Prill was then terminated because "we can't have you calling the cops like this all the time." *Id.*

Notwithstanding any factual issues, the employer did not violate Section 8(a)(1) of the Act when it discharged Prill for refusing to drive his truck and trailer and for contacting state authorities because Prill acted solely on his own behalf – Prill alone refused to drive the truck and trailer; he alone contacted the Tennessee Public Service Commission after the accident; and, prior to the accident, he alone contacted the Ohio authorities. *Id.* Although Prill had overheard other employee's complaints while in the office on another matter, and there was no evidence that Prill and the other employee joined forces to protest the truck's condition. Individual employee concern even if openly manifested by several employees on an *individual* basis, is not sufficient evidence to prove concert of action. *Id.* (emphasis added).

Here, the Consolidated Complaint alleges that from July 2017 through about October 2017, Dr. Schneier was "engaged in concerted activities with other employees for the purposes

of mutual aid and protection by among other ways, discussing concerns about employee turnover rate, Respondent's mistreatment of employees, and patient care practices affecting employee, and bringing those concerns to Respondent." *See* G.C. Exhibit 1(e) (Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing dated September 28, 2018 at Consolidated Complaint ¶ 4(a)). However, at the conclusion of his case-inchief, the evidence and testimony offered by the General Counsel has failed to establish any facts supporting this allegation.

In support of General Counsel's claim that Dr. Schneier was engaged in protected concerted activity, General Counsel only called a single employee to testify – Carla Argueta (hereinafter "Carla"). Carla testified that she noticed that Dr. Khavkin would sometimes become angry. *See* Hr'g Tr. Day 3, Aug. 15, 2019 at pg.462-63. Typically, this was for issues related to getting (or not getting) the necessary time in an operating room, scheduling anesthesia last minute, or issues related to patient care during Clinic hours. *Id.* Carla testified that she had talked about this with Dr. Schneier on her own. Carla did not ask Dr. Schneier to discuss this issue with the office manager or Dr. Khavkin and Dr. Schneier never told her he would talk to any Clinic manager on her behalf. *Id.* at pg. 433. Carla's testimony clearly establishes that any conversation Dr. Schneier had was not as a representative of her or of any group of employees. The testimony from the Hearing follows:

- Q. Did you ever ask Dr. Schneier with regard to your concerns about the expressions of anger, did you ever ask Dr. Schneier to speak to an office manager on your behalf?
- A. No. I think he possibly may have done it on his own. And I on my own just did it as well.
- Q. So, you made your concerns known to the office manager on your own?
- A. Yeah.
- Q. And you didn't authorize Dr. Schneier to speak for you?
- A. I mean he did mention that he would bring it up. But I

never said, oh, can you please go and do this for me.

Q. Okay, thank you. Did you ever ask Dr. Schneier to talk

to Dr. Khavkin for you about his outbursts, alleged outbursts?

A. No.

Carla was the only employee called by General Counsel to support his Consolidated Complaint allegations. Interestingly Carla testified that even after she quit the Clinic she and Dr. Khavkin subsequently discussed her returning to the Clinic. Given that Carla's testimony disavows any potential group activity or intent of Dr. Schneier to act in a concerted fashion, there was no evidence of concerted activity. Carla also testified that even after she quit the Clinic she and Dr. Khavkin maintained an open dialogue and even discussed her returning to the Clinic. *Id.* at pg. 435-36. Carla testified that the reason she left the Clinic and her reason for not returning were the same – a personal conflict with the office manager of the time, not Dr. Khavkin or Dr. Khavkin's behavior. *Id.* at pg. 436 ("I wasn't going to be dealing with an office manager, the reason I quit."). Moreover, Dr. Schneier never testified that he was concerned for employee welfare but instead testified that he was concerned that his perceived issue with employee turnover would affect the Clinic's reputation and his own personal reputation.

General Counsel offered no additional testimony to support their Consolidated Complaint allegations and, therefore, this Board should dismiss the Consolidated Complaint because "General Counsel has the burden to prove that an employee's Section 7 activity was a motivating factor in the employer's adverse employment action against the employee." *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 11 (2018). General Counsel cannot prove the Section 7 Activity was a motivating factor if General Counsel has not even established there was Section 7 Activity to begin with. Dr. Schneier's testimony regarding employee issues was limited to Carla as the other named individuals were not employees but were classified as managers.

Moreover, in addition to Mr. Sensenay, the Consolidated Complaint specifically addresses employee turnover. While General Counsel failed to establish how this is a relevant

issue under the NLRA, Dr. Schneier testified that he could not recall specific names of people with concerns. *See* Hr'g Tr. Day 3, Aug. 15, 2019 at pg. 408-09. Instead, he only listed Mr. Sensenay (manager), Tonya Gottesman – previous office manager, and "everybody." While Dr. Schneier claimed to be "affable" he was unable to list a single employee with a specific concern. *Id.* Because General Counsel has totally failed to show that Dr. Schneier engaged in protected concerted activities, he has not established a prima facie case and this case must be dismissed. *See Buel, Inc.*, 39 NLRB AMR 21 (The Board's test for concerted activity is whether activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.").

2. General Counsel Failed to Prove that Dr. Schneier's Alleged Protected Concerted Activity was a Motivating Factor in the Clinic's Termination Decision.

In addition to General Counsel's failure to establish concerted activities, General Counsel has failed to show a nexus between any concerted activity and the alleged "unlawful discharge." To prove that an employee's discharge violates the Act, the General Counsel must initially show that the employee's protected concerted activity was a motivating factor in the employer's decision to discharge the employee. *Electrolux Home Products, Inc. and J'vada Mason*, Case 15–CA–206187 (August 2, 2019). The elements required to support this initial showing are protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Id.* If the General Counsel makes such a showing, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same adverse action even in the absence of the employee's protected conduct. *Id., citing, Wright Line,* 251 NLRB at 1089; *see also Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997).

Dr. Schneier's discharge should be analyzed under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). "Under *Wright Line*, the General Counsel has the burden to prove that an employee's Section 7 activity was a motivating factor in the employer's adverse employment action against the employee." *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 11 (2018). Only after the General Counsel makes this required initial showing does the burden shift to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the union or other protected concerted activity." *Id.; citing Libertyville Toyota*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir. 2015). The General Counsel failed to make the required initial showing under *Wright Line*. Regardless, the Clinic proved that it would have taken the same action notwithstanding Dr. Schneier's alleged protected concerted activity.

The General Counsel failed to make the required initial showing under *Wright Line* that Dr. Schneier's alleged protected concerted activity motivated his discharge. The elements required to support the General Counsel's initial showing are: (1) protected concerted activity by the employee, (2) employer knowledge of that activity, and (3) animus on the part of the employer." *Kitsap*, above at 11; *citing Libertyville*, 360 NLRB at 1301. *Wright Line* is "inherently a causation test" and, consequently, "[t]he ultimate inquiry is whether there is a nexus between the employee's protected activity and the challenged adverse employment action." *Id.* at 11-12.1

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¹ Because *Wright Line* is "inherently a causation test," "[n]ot just any evidence of animus against protected activity generally will necessarily satisfy the initial Wright Line burden of proving unlawful motivation for the particular adverse employment action at issue." *Id.; citing Roadway Express, Inc.*, 347 NLRB 1419, 1419 fn. 2 (2006) (finding that, although there was some evidence of animus in the record, it was insufficient to sustain the General Counsel's initial Wright Line burden of proof); *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 418-419 (2004) (finding insufficient facts to show that the respondent's animus against the employee's union activity was a motivating factor in the decision not to recall him), enfd. 156 Fed. Appx. 330 (D.C. Cir. 2005))).

3. Dr. Khavkin Did Not Have Knowledge of Dr. Schneier's Alleged Protected Concerted Activity.

General Counsel did not present evidence that Dr. Khavkin was aware of any concerted activity Dr. Schneier was allegedly engaged in. Dr. Khavkin testified that he was never aware of any attempts by Dr. Schneier to organize a group of employees, and that his decision to terminate him was not based on that. *See* Hr'g Tr. Day 3, Aug. 15, 2019 at pg. 569. This makes sense. The process for notifying management of an issue was explained by Office Manager Tonya Gottesman. She was in charge of issues and fielding complaints, and she does not remember receiving complaints about Dr. Khavkin's management style. Interestingly, she does remember complaints about Dr. Schneier, that "he was talking too much about other individuals at the Clinic. That was the main complaint." *See* Hr'g Tr. Day 3, Aug. 15, 2019 at pg. 545. So, while Dr. Schneier alleged that he discussed issues with Dr. Khavkin, it is not clear that there were attempts to remedy this that were ever presented to management or that Dr. Khavkin was aware of them.

4. Dr. Khavkin Did Not Have Animus Towards Dr. Schneier's Alleged Protected Concerted Activity.

Assuming, arguendo, that all of Dr. Schneier's complaints constitute protected concerted activity, and assuming, arguendo, that Dr. Khavkin (or some other manager) was aware of all of those complaints, the General Counsel still failed to prove that Dr. Khavkin had the requisite animus towards that activity to satisfy Wright Line. The Board has traditionally considered the following factors when analyzing whether a decision-maker had animus towards an employee's protected concerted activity: (1) the timing of the employer's adverse action in relationship to the employee's protected activity, (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific

animus, (4) the disparate treatment of the discriminatee, (5) departure from past practice, and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. *Kitsap*, above at 11; *citing National Dance Institute—New Mexico, Inc.*, 364 NLRB No. 35, slip op. at 10 (2016). None of these factors weigh in favor of finding animus towards Dr. Schneier's protected concerted activity.

a. Timing

Generally, the Board will find timing indicative of animus where the discharge decision was made "within a few days" of protected activity. *State Plaza, Inc.*, 347 NLRB 755, 757 (2006). Conversely, the Board will not find the timing of an employee's discharge indicative of animus when Schneier was discharged almost a month after a union election. *EZ Park, Inc.*, 360 NLRB No. 84, slip op. at 4 (2014). Therefore, in applying Board precedent anything beyond that month period of time shows that the timing of the discharge does not establish a correlation.

Here, the Consolidated Complaint alleges that from July 2017 through about October 2017 Dr. Schneier was "engaged in concerted activities with other employees." *See* G.C. Exhibit 1(e) (Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing dated September 28, 2018 at ¶ 4(a)). Dr. Schneier's termination was not until November 21, 2017. Initially, the complaints allegations are precluded under 10(b), but for argument's sake, General Counsel's case-in-chief failed to establish that any alleged concerted activity occurred in late October, 2017. In fact, the sole employee who Dr. Schneier asserts supports his position – Carla Argueta – testified that she voluntarily left the Clinic in October. She quit because of a conflict with the office manager. *See* Hr'g Tr. Day 3, Aug. 15, 2019 at pg. 434. As a matter of fact, she very much downplayed any issues in the working

environment while on the stand. *See* Hr'g Tr. Day 3, Aug. 15, 2019 at pg. 424-25. Consequently, lacking any other evidence General Counsel failed to show that the discharge timing was indicative of animus.

b. Presence of Other Unfair Labor Practices

There is no evidence that the Clinic committed any unfair labor practices during the time period surrounding Dr. Schneier's discharge. In fact, there is no evidence the Clinic engaged in conduct that could even arguably constitute an unfair labor practice around that time period. Consequently this factor does not weigh in favor of finding animus. *North Hills Office Services*, 346 NLRB 1099, 1101 (2006) ("Considering the numerous other violations found by the judge and adopted by the Board in this case, there is substantial evidence of the Respondent's animus to the employees' Section 7 activities..."). As was established by extensive testimony and numerous documents, the crux of the deteriorating relationship between Dr. Khavkin and Dr. Schneier was over a loan agreement which is the subject of a civil action between the parties.

c. Statements and Actions Showing the Employer's General and Specific Animus

There is no evidence in the record that Dr. Khavkin made any statements or took any action indicating that he or the Clinic had any general or specific animus towards Dr. Schneier's alleged protected concerted activity in this case. Dr. Khavkin testified that Dr. Schneier never came to him with any workplace issues of employees or to bring employee complaints. *See* Hr'g Tr. Day 1 Aug. 13, 2019, at pg. 173. Moreover, evidence has shown that Dr. Schneier would not even communicate with Dr. Khavkin. *See* Hr'g Tr. Day 1 Aug.

13, 2019, at pg. 244. But it only got worse, Dr. Schneier began eroding Dr. Khavkin's trust.

Dr. Schneier actively told an employee to lie to Dr. Khavkin, Nicole Blanco testified:

Dr. Schneier had a patient that he had done a hospital consult for. I was not aware of this until he came barging into my office and stating that there was a patient I needed to schedule a surgery for. When he stated the patient's name and had reacted and said, that's Dr. Khavkin's patient . . . he looked at me confused and he said, what do you mean? And I said I have a chart. . . . And he started rummaging through the charts because they're held next to my desk . . . He found the patient that we were discussing. He placed the chart into his like briefcase/laptop case over his shoulder, looked at me, and said disregard. We did not have this conversation. You did not know of this patient. I'll schedule everything I need to proceed with the surgery, and walked out.

See Hr'g Tr. Day 3, Aug. 15, 2019 at pg. 517.

That was it for Dr. Khavkin:

[I]f Dr. Schneier tells my employees to lie to me about certain things and hide certain things from me, I think that's pretty much . . . the straw that with everything that's been going on over the course of the weeks and months, I just didn't feel that I should continue his employment.

See Hr'g Tr. Day 1, Aug. 13, 2019 at pg. 244

Dr. Khavkin's last communication with Dr. Schneier was the November 21, 2017, Termination of Employment Letter wherein the proffered reasons for termination had nothing to do with the alleged protected concerted activities. *See Empire_State Weeklies, Inc.*, 354 NLRB 815, 815 fn. 4 (2009) (finding animus where, during employee's termination interview, owner "interrogated him about his union activities and stated that [he] had been working with the Union for months"); *Inn at Fox Hollow*, 352 NLRB 1072, 1075 (2008) (finding supervisor's statement to union supporter during discharge meeting that "people like you we do not need at this workplace" was evidence of animus). Therefore, there is simply no

evidence of animus towards Dr. Schneier's alleged protected concerted activated by anyone affiliated with the Clinic.

d. Disparate Treatment of the Discriminatee

Notwithstanding three days to offer witness and evidence to support the Consolidated Complaint, there is no indication that Dr. Schneier was treated differently from anyone similarly situated. Dr. Khavkin testified that actually several accommodations were made specifically for Dr. Schneier including: the hiring of an expensive physician assistant, and a new billing team. *See* Hr'g Tr. Day 1 Aug. 13, 2019, at pg. 137. Additionally, Dr. Takagi testified that he would communicate with Dr. Schneier about evaluating patients at different hospitals, which was a common practice at the Clinic in order to assist the team as a whole. *See* Hr'g Tr. Day 1 Aug. 13, 2019, at pg. 483. Dr. Schneier was highly paid, was provided with the tools to be successful, and simply chose to act in a manner inconsistent with his employment. Therefore, there was no disparate treatment of Dr. Schneier.

e. Departure from Past Practice.

There is no evidence that the Clinic departed from past practice with respect to its treatment of Dr. Schneier. This is a unique situation in which Dr. Schneier, a credentialed and sophisticated neurosurgeon, is essentially claiming that he was acting as a representative of the Clinic employees and that was the reason his employment was terminated. General Counsel offered no evidence to show that Dr. Schneier's termination was any different for the termination of any previously employed neurosurgeons.

f. Pretext

There is no evidence that the Clinic's proffered explanation for Dr. Schneier's discharge – "failure to meet the most basic requirements of your employment" – was

pretextual. An employer's stated reason is pretextual if it is either "false or not actually relied upon." *Kitsap*, above at 14. The Board may find pretext if the employer gives shifting or inconsistent reasons for its decision. *See GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive.").

Here, the record is clear that the Clinic did not provide shifting reasons for Dr. Schneier's discharge. The Termination of Employment letter provides that Dr. Schneier was terminated for: failure to meet employment requirements, failure to report surgeries, making several derogatory and accusatory comments concerning other surgeons, and failure to communicate with Dr. Khavkin. *See G.C. Exhibit 8 (Termination Letter dated November 21, 2017).* The Clinic never represented that Dr. Schneier was discharged for any other reason. *See Empire State*, 354 NLRB at 815 fn. 4 (finding employer's stated reason for discharge pretextual where employer "failed to cite insubordination as a basis for [employee's] discharge at the time it discharged [him] [or] during its meeting with the Union regarding [the employee]").

General Counsel may argue that there is animus because Dr. Khavkin discussed additional issues related to Dr. Schneier's job that were not included in the letter, namely the incident detailed by Nicole Blanco. There is no way that Dr. Schneier or General Counsel can reasonably claim that the exclusion of this very concerning and damning episode on a formal, printed termination letter shows a larger pretext to remove Dr. Schneier. If anything, it shows Dr. Khavkin's desire to remain professional and not include a specific example of highly egregious behavior.

The evidence presented at the Hearing overwhelmingly shows an unproductive and insubordinate employee who was rightfully terminated. Blanco testified that Dr. Schneier not only wanted her to lie to Dr. Khavkin, he also took a patient's medical record. *See* Hr'g Tr. Day 3, Aug. 15, 2019 at pg. 517. The medical biller, Tammy J. Theriault, testified that Dr. Schneier was a horrible employee:

Most of the time he would not turn in his paperwork. [I] [a]sked multiple times, he would turn it in to administration or to somebody else but would not turn it in to billing . . . finally it was Dr. Khavkin's problem to get it done. [Schneier was] way behind in his billing, 3 months or more

See Hr'g Tr. Day 3, Aug. 15, 2019 at pg. 533. In contrast, Dr. Takagi testified that he checked his "surgery log every single day . . . [and] talk[ed] to the billing department regularly, weekly . . . all surgeons do this." *Id.* at pg. 491. Generally, he characterized Dr. Schneier as "not a team player. This was not someone I wanted to continue working with," *id.* at 482, because he would not cover other doctors as was expected and it affected the clinic's bottom line, *id.* at pg. 488-89.

Additionally, the Board may also find pretext when the employer fails to conduct an investigation. *See Aliante Gaming, LLC d/b/a Aliante Casino & Hotel*, 364 NLRB No. 78, slip op. at 13 (2016) (finding employer's "failure to conduct an investigation into the alleged misconduct by a discriminate" is evidence of pretext) (citing *ManorCare Health Services—Easton*, 356 NLRB 202 (2010)). As explained above, Dr. Khavkin testified that he had conferred with the Clinic's billing department, he had met with Ms. Blanco, he had been in contact with outside surgeons regarding Dr. Schneier's conduct, and he had even attempted to communicate with Dr. Schneier to determine what the issue was and allow Dr. Schneier an opportunity to defend himself – which Dr. Schneier refused to return. Clearly Dr. Khavkin

conducted a thorough investigation and gave Dr. Schneier ample opportunity to present his side of the story. *See KHRG Employer, LLC d/b/a Hotel Burnham & Atwood Café*, 366 NLRB No. 22, slip op. at 7 (2018) ("The evidence makes clear to me that the Respondent did conduct a thorough investigation which weighs against a finding of discriminatory animus.").

Therefore, based on the weight of the evidence, the testimony of witnesses, and Dr. Schneier's proven conduct, there was no pretext.

5. The Clinic Proved That it Would Have Discharged Dr. Schneier Notwithstanding His Alleged Protected Concerted Activity.

Even assuming the General Counsel could make the required initial showing of discrimination under *Wright Line*, the record is clear that the Clinic would have taken the same action notwithstanding Dr. Schneier's alleged protected concerted activity. It is axiomatic that an employer may lawfully take appropriate action, including discipline and discharge, to address an employee's deficiencies. *Amersino Marketing Group, LLC*, 351 NLRB 1055, 1056 (2007); *citing Moody Chip Corp.*, 243 NLRB 265, 273 (1979) (finding discharge lawful where there was no evidence of animus and employee simply refused to work). That is precisely what the Clinic did here.

To prove that an employee's discharge violates the Act, the General Counsel must initially show that the employee's protected concerted activity was a motivating factor in the employer's decision to discharge the employee. *Electrolux Home Products, Inc. and J'vada Mason*, Case 15–CA–206187 (August 2, 2019). The elements required to support this initial showing are protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Id.* If the General Counsel makes such a showing, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same adverse action even in the absence of the employee's protected conduct. *Id.*,

citing, Wright Line, 251 NLRB at 1089; see also Manno Electric, 321 NLRB 278, 280 fn. 12 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997). "[A] finding of pretext, standing alone, cannot satisfy the General Counsel's initial Wright Line burden . . . the General Counsel must adduce evidence of additional supporting circumstances to establish that the actual reason the discharge or discipline was animus toward union activities." Electrolux at fn 10.

Last August, the NLRB in the *Electrolux Home Products* case noted that, although the respondent's proffered justification for discharging the employee instead of imposing lesser discipline was found to be pretextual, it was also found, on the record as a whole, the General Counsel had failed to satisfy his burden of proving that the employee's protected activity was a motivating factor in her discharge. *Id.* In addressing an alleged unlawful discharge similar to what has been alleged by the General Counsel against Khavkin Clinic, the NLRB provided the following guidance:

When an employer has offered a pretextual reason for discharging or disciplining an alleged discriminatee, the real reason might be animus against union or protected concerted activities, but then again it might not. It is possible that the true reason might be a characteristic protected under another statute (such as the employee's race, gender, religion, or disability), or it could be some other factor unprotected by the Act or any other law, which would be a permissible basis for action under the at-will employment doctrine. Moreover, even pretext, standing alone, cannot satisfy a General Counsel's initial Wright Line burden and a General Counsel must adduce evidence of additional supporting circumstances to establish that the actual reason for the discharge or discipline was animus toward union activities or protected concerted activity.

Id.; citing, Valmont Industries, Inc. v. NLRB, 244 F.3d 454, 466 (5th Cir. 2001) ("An ALJ may not rest [his] entire decision that antiunion animus motivated an employee's discipline on a finding that the employer gave a pretextual reason for its action."); American Crane Corp.

v. NLRB, 203 F.3d 819 (4th Cir. 2000) ("That the employer's stated reasons for its actions are shown to be pretextual is not enough, standing alone, to permit the finding of a violation; the General Counsel must affirmatively adduce evidence of sufficient substance to support a rational conclusion that anti-union animus more likely than not factored into the employer's decision.") (citing Sam's Club v. NLRB, 173 F.3d 233, 243 (4th Cir. 1999)); Union-Tribune Pub. Co. v. NLRB, 1 F.3d 486, 491 (7th Cir. 1993) ("A finding of pretext, standing alone, does not support a conclusion that a firing was improperly motivated."), quoted in Laro Maintenance Co. v. NLRB, 56 F.3d 224, 230 (D.C. Cir. 1995); College of the Holy Cross, 297 NLRB 315, 316 (1989) ("Both the Board and the court[s] require something more than a bare showing of a false reason, i.e., the support of surrounding circumstances.").

Here, just as in the *Electrolux Home Products's* case, the General Counsel has failed to produce evidence or testimony to support an inference that any alleged protected activity was a motivating factor in the respondent's decision to discharge her the General Counsel's case was dismissed. The evidence presented at the Hearing is rampant with proof that Dr. Schneier was fired because he was actively bad for the Clinic's image in the community, creating enemies of potential clients and referral sources by bad mouthing the Clinic and other doctors, and encouraged employees to lie to Dr. Khavkin for his own personal gain. Both Dr. Khavkin and Leon Linton testified Dr. Schneier received a termination letter detailing that he was specifically discharged from his employment because: "(1) [he] failed to meet the most basic requirements of [his] employment" – not performing/billing surgeries; (2) making "derogatory and accusatory comments concerning other surgeons with the Clinic" to third parties and patients; and (3) Dr. Schneier failed to communicate with any manager of Khavkin

Clinic. See G.C. Exhibit 8 (Termination Letter to Schneier dated November 21, 2017).

The evidence supported this. Dr. Khavkin testified:

The reason, true reason for the termination, as I indicate in this letter, was him portraying very poor, unprofessional image for my practice, for my clinic. That had affected my practice. That had affected my reputation that I had built over the course of multiple years. And I just did not believe that Dr. Schneier should continue being part of my practice and continue portray this extremely negative image on behalf of my practice. That's the main reason for the termination."

See Hr'g Tr. Day 1, Aug. 13, 2019 at pg. 157. Dr. Schneier told a neurosurgery coordinator at Spring Valley Hospital that Dr. Khavkin was "incompetent and . . . should not be practicing medicine." *Id.* at pg. 163. Dr. Schneier would use the "N Word" in reference to Dr. Grover, an Indian man, and accused him of being anti-sematic, which was not true. *Id.* at pg. 167-69. Dr. Schneier also called Dr. Grover "incompetent piece of shit. That he doesn't know what the fuck he is doing." *Id.* at pg. 169. Keep in mind, Dr. Grover was a referral source and a prominent doctor in the community. *Id*.

Dr. Takagi reaffirmed these comments in his testimony. Dr. Schneier would say extremely negative things about the Clinic in general, and the doctors who worked there, saying "they were incompetent, they couldn't do their job." *Id.* at pg. 487. He even said that Dr. Schneier was "absolutely crossing the line to talk bad about a physician who did surgery to the patient." *Id.* at pg. 499.

Nicole Blanco (hereinafter "Blanco"), Tammy Theriault, and Tonya Gottesman reiterated the same thing on the stand. Blanco deemed Dr. Schneier "constantly aggressive. It was never a different mood or demeanor with Dr. Schneier . . . Not only [to]myself but everybody felt like they couldn't talk to him." *Id.* at pg. 518, 523. Theriault spoke to his incompetence at billing. *Id.* at 530. And Gottesman heard Dr.

Schneier openly making disparaging comments about the clinic and received a number of complaints about him. *Id.* at pg. 545, 555-56.

Moreover, Dr. Schneier never testified that his employment termination was as a result of bringing employee concerns to the attention of Dr. Khavkin or the Clinic. In fact, on examination of Dr. Schneier, he only testified that he was concerned about employee complaints as how it would affect the Clinic's reputation and his personal reputation. He never testified to trying to actively change the Clinic's policies or that this activity was the type that is protected under the NLRA.

General Counsel spent a significant amount of time discussing an alleged loan between Dr. Khavkin and Dr. Schneier. It is clear from the record that there is a financial dispute between the parties and Dr. Schneier testified that he believed that this dispute would lead to his employment termination. Dr. Schneier testified he was so concerned about this that he approached a lawyer "Maria" in order to obtain legal advice on how to proceed. The loan establishes the corrupt motive behind Dr. Schneier's charges. Dr. Schneier admitted on the stand that he "didn't file the charges with the NLRB until after a lawsuit was filed by Dr. Khavkin to recover on alleged loan." *Id.* at pg. 414. There is no other explanation for his delay.

After three days of evidence and testimony, the General Counsel has failed to provide the Administrative Law Judge with any evidence that the motivating factor in the discharge decision of Dr. Schneier was because he was engaging in protected concerted activity. Therefore, General Counsel has failed to establish a prima facie case and the Consolidated Complaint should be dismissed.

The record is clear that there is no evidence of disparate treatment. Consequently, the only reasonable conclusion that can be drawn from the evidence is that the Clinic would have discharged Dr. Schneier notwithstanding any alleged protected concerted activity. *See Las Vegas Limousine*, 340 NLRB 1005, 1010 (2003) ("It is not extraordinary that an employer should expect employees to follow supervisors' directions. The simple facts are that Dr. Schneier was a difficult employee, was rude, was unable to fulfill his employment obligations, and due to his willful failure to communicate with Dr. Khavkin – insubordinate. As stated in the termination letter, because Dr. Schneier failed to meet the most basic requirements of his employment, he was justifiably terminated.

6. Under The NLRB's New Standard Established Under *Boeing Company Co.*, Khavkin Clinic's Neutral Confidentiality Clause Did Not Infringe on Dr. Schneier's Rights.

To determine the lawfulness of an employer's rule/handbook provision, the Board determined whether the employer's rule/handbook provision, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, and if so, the Board must evaluate two things: (i) the nature and extent of the rule's adverse impact on Section 7 rights, and (ii) the legitimate business justifications associated with the rule. The Boeing Co., 365 NLRB No. 154 (Dec. 14, 2017). In Boeing, the Board analyzed a no-camera rule imposed by Boeing. Id. at 18. This no-camera rule stated in part that, "possession of [certain] camera-enabled devices is permitted on all company property and locations, except as restricted by government regulation, contract requirements or by increased local security requirements... However, use of these devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security." Id. at 19. In defense of its policy, Boeing offered five reasons for the policy:

- The no-camera rule is an integral component of Boeing's security protocols, which are necessary to maintain Boeing's accreditation as a federal contractor to perform classified work for the United States Government;
- The no-camera rule plays a key role in ensuring that Boeing complies with its federally mandated duty to prevent the disclosure of export-controlled information or the exposure of export-controlled materials to unauthorized persons;
- The no-camera rule helps prevent the disclosure of Boeing's proprietary information;
- Boeing's no-camera rule limits the risk that employees' personally identifiable information will be released; and
- The no-camera rule limits the risk of Boeing becoming a target of terrorist attack.

Id. at 20.

Ultimately, the Board considered these reasons persuasive, finding that any adverse impact of Boeing's no-camera rule on the exercise of Section 7 rights is comparatively slight and is outweighed by substantial and important justifications associated with the no-camera rule's maintenance. Accordingly, Boeing's maintenance of the no-camera rule did not constitute unlawful interference with protected rights in violation of Section 8(a)(1) of the Act. *Id.* at 22

Here, as in *Boeing*, Respondent has also promulgated a facially neutral rule regarding confidentiality and non-disclosure of certain information. As in *Boeing*, Khavkin Clinic's Confidentiality/Non-Disclosure Agreement in its Employee Handbook is designed to protect the operating and financial future of the Clinic. In order to achieve that goal, the Clinic designated certain items as confidential including:

- Technical and non-technical information related to Yevgeniy A Khavkin MD PC provided by either party to the other, including but not limited to *client(s)* personal and professional information,
- Yevgeniy A Khavkin MD PC trade secrets, business proprietary informationideas, techniques, know-how, processes, software programs, and formula related to the current, future and proposed products and services of Yevgeniy A Khavkin MD PC, and including without limitation, their respective information concerning research, development, financial information,

- procurement requirements, purchasing, customer/patient lists, investors, employees, business and contractual relationships, business and contractual relationships,
- Business forecasts, sales, and merchandising, marketing plans and information the disclosing party provides regarding third parties, or
- Anything else relating to Yevgeniy A Khavkin MDPC.

See G.C. Exhibit 1(e) (Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing dated September 28, 2018 at ¶¶ 4(b) & 6).

In applying the *Boeing* standard, the Clinic had numerous legitimate business justifications to support the aforementioned rule. The Clinic has a legitimate business interest in protecting its technical and non-technical information. This policy, when reasonably interpreted, does not interfere with the exercise of NLRA rights. The Clinic has a responsibility to their clients to protect their employee and client information. In order to fulfill the Clinic's obligation to its clientele and employees, the Clinic must prevent the dissemination of such information. The Clinic has a legitimate interest in the protection of privileged and/or sensitive information. The above rule allows Khavkin to comply with federal regulations as well as maintain its internal privacy standards. The protection granted in the Confidentiality/Non-Disclosure Agreement limits the risk that client and employee personally identifiable information will be released, prevents the disclosure of proprietary and confidential information, and plays an integral role in ensuring Khavkin complies fully with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The language of this rule cannot be reasonably construed to be interpreted as a prohibition of a Section 7 activity.

Furthermore, as part of protecting its interests, the interests of its clients, and to protect its employees, the Clinic has implemented certain guidelines regarding email use and

communication between employees:

... Employees are prohibited from using e-mail to engage in activities or transmit content that is harassing, discriminatory, menacing, threatening, obscene, defamatory, or in any way objectionable or offensive....

... Employees are prohibited from using e-mail to operate a business, conduct an external job search, solicit money for personal gain, campaign for political causes or candidates, or promote or solicit funds for a religious or other personal cause...

See G.C. Exhibit 3 (Employee Handbook, at Pg. 22, 23).

The Clinic has a responsibility to its employees to provide a non-hostile work environment. To protect itself and its employees, the Clinic has a reasonable expectation to curtail the actions proscribed above, namely, "transmit(ting) content that is harassing, discriminatory, menacing, etc." Employees behaving in this manner would constitute a hostile work environment. In *Purple Communications, Inc.*, 361 NLRB 575 (2014), the Board discusses the right of the employer to enforce regulations pertaining to the employee use of email, namely, "the employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline." Pursuant to *Boeing*, employers requiring employees to foster "harmonious interactions and relationships" do not violate the NLRA. *The Boeing Company*, 365 NLRB No. 154 (2017). The Clinic's regulation enforcing civility while using the company email system fosters a safe work environment, as well as protects the Clinic from lawsuits arising out of the proscribed conduct.

The Clinic has implemented its regulations necessary to maintain the privacy and professional standards of the Clinic. It is a reasonable expectation of an employer that an

employee not utilize the email system of the employer to solicit money for personal gain or gain of a personal cause. Recipients of such solicitation may falsely align the request of the employee to reflect the views, ideology, or opinions of the employer and email system host. The regulations preventing these solicitations, however, in no way prohibit employees from discussing the terms and nature of their employment with one another or any other protected, concerted activity.

Clinic's rules and regulations have been implemented for legitimate business reasons and have minimal to no effect on rights under the Act. Therefore, the Clinic's actions are supported under the law and the Board should grant summary judgment and dismiss the Consolidated Complaint.

V. <u>CONCLUSION</u>

Notwithstanding General Counsel's allegations of concerted activities, the Clinic's decision to discharge Schneier had nothing to do with any alleged protected comments, discussion, or organization of employees. Dr. Schneier was specifically discharged from his employment because: "(1) [he] failed to meet the most basic requirements of [his] employment" – not performing/billing surgeries; (2) making "derogatory and accusatory comments concerning other surgeons with the Clinic" to third parties and patients; and (3) Dr. Schneier failed to communicate with any manager of Khavkin Clinic. Essentially, Dr. Schneier was terminated for failing to do his job and for basic insubordination. No evidence or testimony supporting Schneier's allegations or dispute to the Clinic's position has been produced or provided. The language of the Consolidated Complaint alone does not provide the support to maintain the claims against the Clinic and accordingly should be dismissed.

Therefore, dismissal of the Consolidated Complaint – based on the evidence provided – is justified.

DATED this 3rd day of October 2019.

By: /s/ Jason D. Guinasso, Esq.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I AM AN EMPLOYEE OF HUTCHISON & STEFFEN, PLLC. and that on this 3rd day of October, 2019, I caused a true and correct copy of the **RESPONDENT'S POST-**

HEARING BRIEF to be filed through the NLRB E-Filing System:

Gerald M. Etchingham, Associate Chief Judge Division of Judges, San Francisco Office 901 Market Street, Suite 485 San Francisco, CA 94013

I FURTHER CERTIFY THAT I AM AN EMPLOYEE OF HUTCHISON & STEFFEN, PLLC. And that on this 3rd day of October, 2019, I caused a true and correct copy of the **RESPONDENT'S**

POST-HEARING BRIEF and a copy was emailed to the parties listed below:

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I hereby declare, under penalty of perjury by the laws of the State of Nevada, County of Washoe, that the aforementioned is a true and correct statement of fact.

DATED: October 3rd, 2019.

Schneier

/s/Bernadette Francis
Employee of Hutchison & Steffen, PLLC